IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1218

LEWIS E. NEUGENT,

Petitioner

VS:

STATE OF ALABAMA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

ROBERT M. HILL, JR.
119 Mobile Street Plaza
Florence, Alabama 35630

205 757-0700

Attorney For Petitioner

INDEX

APPENDICES

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. _____

LEWIS E. NEUGENT,

Petitioner

VS:

STATE OF ALABAMA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

The petitioner, Lewis E. Neugent, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Criminal Appeals of Alabama rendered in these proceedings on August 24, 1976 and made final on December 3, 1976.

OPINIONS BELOW

Original Opinion of the Court of Criminal Appeals of Alabama, *Lewis E. Neugent v. State*, 58 Ala. App. —, 340 So. 2d 43 (Appendix A, p. 10). Opinion of Supreme Court of Alabama, on certiorari, *In re Lewis E. Neugent v. State*, 295 Ala. —, 340 So. 2d 52 (Appendix B, p. 30). Opinion of Court of Appeals of Alabama on remand *Lewis E. Neugent v. State*, 58 Ala. App. —, 340 So. 2d 55 (Appendix C, p. 36).

JURISDICTION

The Order and Opinion of the Court of Criminal Appeals of Alabama was entered on December 16, 1975 reversing the judgment of the trial court (Appendix A, p. 10). The Order and Opinion of the Supreme Court of Alabama was entered on June 4, 1976 reversing and remanding the Order and Opinion of the Court of Criminal Appeals of Alabama (Appendix B, p. 30). The Order of the Court of Criminal Appeals of Alabama was entered on August 24, 1976 affirming the judgment of the trial court on remand and mandate of the Supreme Court of Alabama (Appendix C, p. 36). The Order of the Court of Criminal Appeals denying rehearing was entered on October 26, 1976 (Appendix D, p. 37). The Order of the Supreme Court of Alabama denying further certiorari was entered on December 3, 1976 (Appendix E, p. 47).

This petition for certiorari was filed less than ninety (90) days from December 3, 1976.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. When two separate and distinct premises are alleged in the affidavit of a search warrant, but a factual basis of probable cause only relates to one, will such basis sustain a search of the other?

2. To establish the "reliability" of an unnamed informer, will the bare conclusion "whose record of reliability for correctness has been good", meet the Constitutional mandate?

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons houses, papers and effects, against unreasonable searches and seizures shall, not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

STATEMENT OF CASE

On August 9, 1973, a search warrant issued on an affidavit of police officer, John Cooke, on "information from a person whose record or reliability for correctness has been good", in part as follows:

> "... that there is presently contained on the premises of Neugent Truck Stop and/or Lewis Neugent Residence ... illegal drugs .... The aforesaid informant stated that he saw said illegal drugs on said premises described on the 9th day of August, 1973 3 hours prior to making this affidavit. The informant also stated that Lewis Neugent, who resides at the above address, was seen selling amphetamines at the truck stop but the amphetamines are brought from the residence." (Appendix F, p. 48).

Armed with subject search warrant Officer Cooke and others searched the truck stop [redacted] but failed to "discover anything". Whereupon Officer Cooke "advised" him (defendant) we had a search warrant for his residence also". The defendant then got the key to the residence out of the

cash register in the truck stop and accompanied the officers to the residence. A subsequent search of the residence revealed certain amphetamines the subject of the judgment of conviction in the trial court.

The *truck stop* is described in the affidavit as follows:

> ". . . reached by traveling South on U. S. Highway 43 from its intersection with U. S. Highway 72 for approximately one to one and one-half miles; the truck stop being located on the West side of U. S. Hwy. 43. The truck stop being a truck stop and restaurant combination contained in one white block building . . ." Appendix F, p. 48).

The *residence* is described as:

> ". . . reached by traveling West on a gravel road located approximately 50 feet North of said truck stop for a distance of 150 to 200 yards. The residence being the only dwelling house located on said gravel road, the residence being a brick or masonry building . . ." (Appendix F. p. 48).

On February 12, 1975 defendant filed Motion to Suppress the evidence obtained in subject search and seizure. In addition to general grounds alleging an "illegal search and seizure" (Grounds 1 and 2, R. p. 8), specific grounds alleged a failure of the warrant to allege that the informant "is a reliable informer" (Grounds 8 and 9, R. p. 9), and that the warrant was invalid in that it "sets out two separate places to be searched" (Ground 11, 12, R. p. 9). The trial court duly overruled the Motion and admitted the warrant in evidence (R. p. 80). (Also see Appendix A, p. 13).

REASONS FOR GRANTING WRIT

1.

It is admitted that subject search warrant contained a positive factual basis for the fruitless search of the *truck stop*. The issue is whether these facts would sustain the subsequent search of the *residence?*

First, it is noted that the search warrant sets out two separate premises in the disjunctive, i.e. "the premises of Neugent Truck Stop and/or Lewis Neugent Residence". This disjunctive allegation reveals uncertainty or speculation concerning one of the two premises.

Secondly, the only positive statement of the informant concerning the two premises relates to the *truck stop*, i.e. "Lewis Neugent . . . was seen . . . selling amphetamines at the truck stop."

Thirdly, purported probable cause is alleged in the statement — "informant stated he saw said illegal drugs on *said premises described* . . . 3 hours prior to making this affidavit". The affiant fails, however, to state which of the two premises described the allegation refer. This is left to pure conjecture and speculation.

Lastly, the *only* reference to the residence is the unfounded conclusion "the amphetamines are brought from the residence". This latter statement supports the original disjunctive allegation of uncertainty and speculation about one of the two premises. Since the only positive statement refers to the truck stop, construing the search warrant most strongly against the defendant"[1] the uncertainty and speculation would

[1] See however, **Keiningham v. United States,** (CCA, DC) 287 F. 2d 126, 129 where the Court of Appeals notes that is is well settled that search warrants must be "strictly construed" against the State.

relate to the subsequent search of the *residence*.

This Court has not heretofore directly ruled on the two premises issue;[2] however, this Court has viewed with disdain general or blanket searches. *Stanford v. Texas*, 379 U. S. 476, 485 S. Ct. 506, 13 L. Ed. 2d 431.

Since in this case a search of the truck stop produced nothing and the residence was also mentioned in the terms of the warrant, it might be argued that the officer had probable cause at this juncture to search the residence as a last resort. Apparently the Supreme Court of Alabama found merit along this line in reversing the Court of Criminal Appeals.

This proposition would not be in accord with prior decisions of this Court.

In *Jones v. United States*, 357 U. S. 493, 497, 78 S. Ct. 1253, 2 L. Ed. 2d 514, this Court held that where the search was outside the original warrant "[i] is well settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant." Moreover, a search unlawful at its inception "could not constitute proof against the victim of the

[2] For decisions of the United States Court of Appeal on the "two premises" issue see **United States v. Hinton**, (7 Cir.) 219 F. 2d 324, 325-26, where the Court in invalidating the search of two apartments in the same building held that "[p]rrobable cause must be shown for searching each house or, in this case each apartment"; **Keiningham v. United States**, (CCA, DC) 287 F. 2d 126, 129 where the Court held that even where two houses are used as a single unit a search warrant for one cannot be construed to embrace the other; and **United States v. Kaye**, (CCA, DC) 432 F. 2d 647 where the Court held that where a store and apartment in the same building were not intergrated units with access, a warrant for one would not justify an intrusion into the other.

search." *Wong Sun v. United States*, 371 U. S. 471, 484, 83 S. Ct. 407, 9 L. Ed. 2d 441.

The Supreme Court of Alabama notes a number of omissions in subject search warrant and finds same to be "solovenly pleading" and "indefinite and uncertain" (Appendix B, p. 34), but dismisses such as "hypertechnical construction" as condemned in *United States v. Ventresca*, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684. Petitioner admits, at least argumendo, this contention; however, it is not these omissions which Petitioner insist on as error before this Court, but the *complete* lack of probable cause as it relates to the *residence*. As stated in the original opinion of the Court of Criminal Appeals how the informant determined a factual basis of probable cause as it relates to the residence "is left to conjecture and speculation". (Appendix A, p. 24).

2

In its original opinion the Court of Criminal Appeals of Alabama stated "[w]e have reason to believe that the unsupported statement that, 'I have received information from a person whose record of reliability for correctness has been good' will someday be held to be insufficient by higher authority than this Court" (Appendix A, p. 21).

It is noted that the "reliability" of the informer is expressed in the past tense, "has been", referring to some unknown occasion in the past, and the quality of "correctness" is expressed by the sole word "good" which is not factual.

The above cited language was approved by the Supreme Court of Alabama in the case of *State Ex Rel. Attorney General*, 286 Ala. 117, 237 So. 2d 640, 643, and since that time, governmental agents in Alabama have used this identical,

stereotype language, as in the case sub judice, as the sole support for reliability of an unnamed informer. Until ruled upon by this Court this unsupported conclusion of reliability will continue to be used as the sole criteria for invading the security and privacy of citizens.

In *Aquilar v. Texas*, 378 U. S. 108, 114, 84 S. Ct. 1509, 12 L. Ed. 2d 723 this Court in upholding anonymous heresay in an affidavit, mandated that the magistrate be informed of "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable' ".

The effect of the present holding in Alabama would be to nullify the "underlying circumstances" test of *Aquilar*. As stated in the original opinion of the Court of Criminal Appeals "[t]he statement in the instant case is a mere abstract conclusion that the information was from a person whose record for reliability and correctness has been good. No personal knowledge or personal dealings with the affiant is alleged to show reliability." (Appendix A, p. 18).

Unlike the affidavits in *Jones v. United States*, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 and *United States v. Harris*, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723, the affidavit in the instant case does *not* contain (1) independent corroboration of the informant (2) affiant's own knowledge of the accused's background and reputation nor (3) statement by the informant against his penal interest.

CONCLUSION

For the reasons stated herein, Petitioner respectfully prays that this Petition for writ of Certiorari be granted.

Respectfully submitted,
Robert M. Hill, Jr.
119 Mobile Street Plaza
Florence, Alabama 35630
Attorney For Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Petition for Writ of Certiorari upon the Honorable Carol Jean Smith, Assistant Attorney General, State of Alabama, 250 Administrative Building, Montgomery, Alabama, 36130 Attorney for Respondent, by mailing three copies of same in the U. S. Mail, postage prepaid.

This the 1st day of March, 1977.

Robert M. Hill, Jr.
Attorney for Petitioner

APPENDICES

APPENDIX A

THE COURT OF CRIMINAL APPEALS OF ALABAMA
8 DIV. 655
LEWIS E. NEUGENT
V
STATE OF ALABAMA
(Filed December 16, 1975)

BOOKOUT, JUDGE

Illegal possession of amphetamines; sentence: eight years imprisonment.

On August 9, 1973, a search warrant was executed against the appellant for the search of his residence located west of Neugent's Truck Stop on Highway 43, Tuscumbia, Alabama. John Cooke, Detective Sergeant for the City of Tuscumbia, executed the affidavit upon which the search warrant was issued. The affidavit was based upon hearsay information given to the officer by an undisclosed informant. The affidavit set out the premises containing amphetamines as, "Neugent Truck Stop and/or Lewis Neugent Residence," however, the search warrant listed only the residence. Both were searched, but drugs were found only in the residence.

Since the search and seizure in this case are based solely on the hearsay information of an undisclosed informant, it is important to determine whether sufficient evidence establishing probable cause was before the issuing magistrate. The evidence upon which the warrant was issued is contained in the following affidavit:

"STATE'S EXHIBIT A

"STATE OF ALABAMA)(
"COLBERT COUNTY)(

"Personally appeared before me, Jerry M. Vanderhoef, Judge of the Colbert County Court of Colbert County, Alabama, John Cooke, who after first being duly sworn by me, and who is personally known to me, deposes and says as follows:
"I have received information from a person whose record of reliability for correctness has been good; that there is presently contained on the premises of Neugent Truck Stop and/or Lewis Neugent Residence, the residence being located some 150 to 200 yards West of said truck stop, the residence being reached by traveling West on a dirt road within approximately 50 feet of said truck stop. The truck stop to be searched is reached by traveling South on U. S. Highway 43 from its intersection with U. S. Highway 72 for approximately one to one and one-half miles; the truck stop being located on the West side of U. S. Hwy. 43. The truck stop being a truck stop and restaurant combination contained in one white block building, approximately 100 feet West of U. S. Hwy. 43, the residence of Lewis Neugent being reached by traveling West on a gravel road located approximately 50 feet North of said truck stop for a distance of 150 to 200 yards. The residence being the only dwelling house located on said gravel road, the residence being a brick or masonry building in the police jurisdiction of Tuscumbia, Colbert County, Alabama, illegal drugs, to-wit: Marijuana, amphetamines and barbiturates. *The*

aforesaid informant stated that he saw the said illegal drugs on said premises described on the 9th day of August, 1973, 3 hours prior to making this affidavit. The informant also stated that Lewis Neugent, who resides at the above address, was seen selling amphetamines at the truck stop but the amphetamines are brought from the residence. This information was given to me by said informant August 9th, 1973.

"Based on all the above information received from my reliable informant, I have probable cause to believe and do believe that there are contained in the residence of Lewis Neugent and Nugent Truck Stop, located at Highway 43 South Tuscumbia, Colbert County, Alabama, illegal drugs, to-wit: marijuana, amphetamines and barbiturates.

"I make this affidavit for the purpose of securing search warrants for the purpose of searching Lewis Neugent and the premises located at Neugent Truck Stop and Lewis Neugent residence West of Highway 43 South, Tuscumbia, Colbert County, Alabama.

"/s/ John Cooke
Affiant

"Sworn to and subscribed before me, this the *9th* day of August, 1973.

"/s/ Jerry M. Vanderhoef
Judge"

(Emphasis supplied.)

Appellant filed a motion to suppress the fruits of the search and seizure, which was overruled. During trial, he objected to admitting into evidence two bags of pills and one bag of capsules on grounds that such were obtained by an illegal search and seizure. The trial court overruled his objection and admitted the exhibits into evidence.

I

A search warrant based on hearsay of an undisclosed informant is not defective provided proper facts or circumstances are presented to the issuing magistrate upon which probable cause could be based. Fourth Amendment decisions by the United States Supreme Court require that magistrates make an independent determination of probable cause based upon evidence or "underlying circumstances." The Court expressed in *Johnson v. United States,* 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948):

> ". . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

That Court, further, has required that the issuing magistrate not depend solely upon the conclusions of the affiant. This limitation was applied to search warrants in *Nathanson v. United States,* 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933), and to arrest warrants in *Giordenello v. United States,* 357 U.S. 48, 78 S.Ct. 1245, 2 L.Ed. 2d 1503 (1958). In the latter case, the Supreme Court stated:

> "The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining

officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.

. . . . .

"The Complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

In 1960, the Supreme Court in *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, held that hearsay may be the basis for the issuance of a warrant by a magistrate. From that point forth, the problems confronting the police officer, the issuing magistrate and the appellate courts, due to hearsay information provided by an undisclosed informant, have been compounded. In 1964, in an attempt to clarify the law in this regard by establishing certain guidelines for the magistrate to evaluate hearsay information, the Court rendered the landmark decision of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723. That decision was further refined in a second landmark decision, *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

Judge Charles E. Moylan, Jr., of the Maryland Court of Special Appeals, makes an excellent analysis of the problem with which we are here confronted in his "Hearsay and Probable Cause: An Aguilar and Spinelli Primer." Mercer Law Review, Vol. 25, p. 741 (1974). At pages 750-751, Judge Moylan states:

". . . Whether the magistrate is dealing with a primary, a secondary or even, theoretically, a tertiary source, he must still (1) assess the credibility of that source and (2) then weigh the information furnished if he believes it to be true.

"Whether the information being evaluated is the direct observation of the affiant or is hearsay information, the issuing magistrate is required to perform the same intellectual surgery. In determining the existence *vel non* of probable cause, the magistrate must make two distinct determinations. The number and the nature of these determinations do not vary, whether the specimen being analyzed is direct observation or hearsay information. He must:

"(1) Evaluate the truthfulness of the source of the information; and

"(2) Evaluate the adequacy of the factual premises furnished by that source to support the validity of the source's conclusion.

"In the first instance, he is judging the integrity of a person. In the second instance, he is judging the logic of a proposition. . . .

. . . .

"Just as the magistrate must satisfy himself as to the credibility of a primary source by administering an oath to him and by looking at him, so too must he, by some alternative means, satisfy himself as to the credibility of the secondary source. In neither case may he accept someone else's conclusion in lieu of arriving at his own. Just as he may not permit an

affiant's asserition as to his own credibility to serve as dispensation for the oath, neither may he permit the affiant's assertion as to his informant's credibility to serve as dispensation for the required recital of all necessary data about that informant that will permit the magistrate to draw his own conclusion as to credibility. This, simply, is the 'credibility/reliability' or 'veracity' prong of *Aguilar*.

"Once the magistrate has decided that the informant is believable, he has still only half completed his ultimate determination. He must still decide what the information is worth. He has decided that the source is not lying, but he has not yet decided whether the source is mistaken. The magistrate's second function is now to evaluate the information which he is accepting as true and to see what probabilities emerge from that available data. Again, he may not accept the conclusion of either the affiant-observer or the non-swearing informant. He must take from either of these sources his facts and then arrive at his own conclusion as to the significance of those facts."

We have had *Aguilar* with us some fifteen years and *Spinelli* for nine years. While those cases placed somewhat of a burden upon law enforcement officers in composing an adequate affidavit, and upon a magistrate in determining the sufficiency of the affidavit, there should now have been sufficient time since those decisions were rendered that law officers, magistrates and trial judges should be familiar with the basic requirements enunciated in those decisions. Not only has this not happened, but we find great differences of opinion in most decisions rendered by appellate courts concerning the sufficiency of affidavits.

This Court, being bound by the decisions of the United States Supreme Court and the Supreme Court of Alabama, must apply to affidavits and warrants the tests set out in the opinions of those courts when such is brought before us on appeal. Those courts and this Court, repeatedly and with unanimity have pronounced the legal principle that a warrant is invalid where the supporting affidavit is nothing more than the bare conclusion of the affiant, as to the integrity and reliability of the unnamed informant, or as to the matter alleged in the affidavit. The courts differ, however, in application of that principle of law to the facts in various cases.

In *Aguilar*, the affidavit read in part, "Affiants have received reliable information from a credible person." In *Spinelli*, it was stated that the F.B.I., "has been informed by a confidential reliable informant." In the instant case, the affidavit states, "I have received information from a person whose record of reliability for correctness has been good."

We find the identical wording in the affidavit in *Davis v. State*, 46 Ala.App. 45, 237 So.2d 635 (1969), affirmed in *State ex rel. Attorney General*, 286 Ala. 117, 237 So.2d 640 (1970). There, the affidavit recited in summary form, "Information from a person whose record of reliability for correctness has been good. . . ." This Court reversed on grounds, *inter alia*, that such wording was an unsupported conclusion of the affiant. However, on certiorari the Alabama Supreme Court affirmed on other grounds, but held that the above wording in the affidavit was adequate to show the basis for the officer's conclusion that the informant was reliable. The Court there stated that such wording was more than the showings disaproved in *Aguilar* and *Spinelli*.

Since the Alabama Supreme Court has held the above

language to be adequate, it would appear that this Court would be bound thereby. While we recognize the import of the holding in *State ex rel. Attorney General*, supra, we likewise recognize that it was decided in 1970. Since that time, numerous holdings by the Federal courts as well as the tenor of some decisions by the Alabama Supreme Court itself would indicate that the language approved of in *State ex rel. Attorney General* may no longer be held to be valid.

We have analyzed a number of Federal cases as well as decisions by the Alabama Supreme Court and this Court wherein the conclusion of an affiant as to the reliability of an informer has been held to be sufficient. In each of those cases, there was substantially more underlying circumstances supplied by the affiant than in the instant case or in the *Davis* case, supra. We likewise note that the above quoted statement in the instant case is *objective* in nature whereas in most other cases, the statement concerning reliability of the informant has been *subjective*. For instance, in *Funches*, infra, after stating the conclusion that the informer was reliable and credible, the affidavit went on to state, "My informer is reliable because he has given me information in the past two months concerning narcotics, which has led to arrests and convictions in courts in Mobile County." There, the officer was making a subjective statement as to the reliability of his informant. The informent was reliable because he had given the *officer* information. In the instant case, no such allegation is made. The statement in the instant case is a mere abstract conclusion that the information was from a person whose record for reliability and correctness has been good. No personal knowledge or personal dealings with the affiant is alleged to show reliability. Also see: *Goodman v. State*, 50 Ala. App. 281, 278 So. 2d 729, cert. denied 291 Ala. 780, 278 So. 2d 733 (1973).

For cases where a subjective allegation as to reliability has been tendered, or when substantiating facts and additional underlying circumstances have been given by the affiant, see: *United States v. Harris*, 403 U.S. 573, 29 L.Ed.2d 723, 91 S.Ct. 2075 (1971); *United States v. Damitz*, 495 F.2d 50 (1974); *Funches v. State*, 53 Ala.App. 330, 299 So.2d 771, cert. denied 293 Ala. 752, 299 So.2d 778 (1974); *Russell v. State*, 53 Ala. App. 477, 301 S. 2d 214 (1974); *Buckles v. State*, 50 Ala.App. 548, 280 So.2d 810 (1972).

The Circuit Court of Appeals, Fifth Circuit, in *United States v. Acosta*, 501 F.2d 1330 (1974), held an affidavit to be insufficient for want of facts to enable the magistrate to conclude that the informant was reliable. In the affidavit in *Acosta*, there was a recitation that the informant had on other occasions assisted Federal agents in initiating cases. In that case, the informant had been the source of information on which the magistrate had issued previous warrants and therefore the magistrate, based upon his own personal knowledge and his past experience with the informant, issued the warrant. The Fifth Circuit held that to be insufficient; that the information must be supplied from the affidavit to the magistrate.

An affiant's assertions as to the reliability of his informant was upheld by this Court and by the Alabama Supreme Court where such was bolstered by the statement that, "[t]his informer has given information on other occasions (sic) that has proven correct and has resulted in some arrests." Additional underlying circumstances were also given to support the conclusion of the affiant in that case. *Bates v. State*, 51 Ala.App. 338, 285 So.2d 501, cert. denied 291 Ala. 773, 285 So.2d 506 (1973).

In *United States v. Hill*, 500 F.2d 315 (1974), the Fifth Circuit Court of Appeals held the affiant's conclusion that his confidential informant was credible to be sufficient because the following additional underlying circumstances were given in support of the conclusion:

> "'. . . (1) the allegation of the affiant that he regarded the informant as "prudent"; (2) the detail provided in the tip; (3) the fact that the affidavit also alleged that the accused had a reputation for being a trafficker in nontax-paid liquor; and (4) the fact that the information given, with the allegations of the informant's purchases, was a declaration against the informant's penal interest.'"

We have discovered other Federal cases where the allegation as to reliability was upheld due to a declaration against the informant's penal interest.

In *United States v. Counts*, 471 F.2d 422 (1973), the Second Circuit Court of Appeals held the recitation of reliability in an affidavit to be sufficient, but again there was more information supplied the magistrate than in the instant case. In *Counts*, there was a recitation that information previously received from the same informants had been reliable and that three arrests were pending grand jury action which had been based upon such information, with names and dates specifically supplied.

In *Haynes v. State*, 50 Ala.App. 96, 277 So.2d 372 (1973), we held an affidavit to be deficient for lack of underlying circumstances wherein the affiant merely concluded that his informant was "truthful" and his information was "reliable."

While we agree that no specific "batting average" of

an informant is mandatory to establish an informant's reliability, the rule appears to be that sufficient facts or underlying circumstances must be given in the affidavit upon which the magistrate can make an independent determination that the informant is reliable. We have reason to believe that the unsupportd statement that, "I have received information from a person whose record of reliability for correctness has been good," will someday be held to be insufficient by higher authority than this Court. However, we have been unable to find a United States Supreme Court decision holding that language to be insufficient, and in light of approval given to that language by our Supreme Court in *State ex rel. Attorney General*, supra, we have no alternative but to hold it to be sufficient.

We must now press forward to the second prong of the *Aguilar* test; that of determining if sufficient underlying circumstances are set forth in the affidavit upon which the issuing magistrate may find probable cause to send officers of the law forth to search the residence of the appellant.

II

In reviewing the substance of the affidavit in question, we find that it meets the "time" test of *Davis*, supra, and *Walker v. State*, 49 Ala.App. 741, 275 So.2d 724 (1973), in that the informant states that he saw illegal drugs on the date of, and three hours prior to making the affidavit. It fails to meet other standards however.

Cates, P.J., writing for this Court in *Horzempa v. State*, 52 Ala.App. 153, 290 So.2d 217 (1973), affirmed 292 Ala. 149, 290 So.2d 220, held the following recitation in an affidavit to be insufficient:

"'Affiant has received information from two different reliable informants that they have been in the above described residence on several occasions recently and there have been drugs that are above described in the residence . . . Both informants have made numerous drug buys for affiant in the past two weeks and their reliability has been established. The last buy was made three days ago and was a good buy. Both informants state the above drugs of Marihuana and Mescaline are now in the house which is described above. . . .'"

There Judge Cates wrote:

"But the instant affidavit . . . does not state how the informants learned of the drugs being in the house. Nor does it show how they arrived at the statement as to the presence of drugs being there 'now.' Nor does it show whether the informants saw, touched, smelled, bought, or otherwise came in contact with the drugs on the several 'recent' occasions when they were in the residence."

Thus, this Court concluded that the affidavit failed to give sufficient underlying circumstances from which the informants exhibited probable cause that the drugs were where they claimed them to be.

In *Clenney v. State*, 281 Ala. 9, 198 So.2d 293 (1966), the Supreme Court, through Justice Coleman, stated:

"The affiant *must state evidence*, other than hearsay, to justify a conclusion that the article to be searched for is where he says it is. The affiant must state *evidence*, other than hearsay, to justify a conclusion

that the hearsay is reliable. . . ." (Emphasis supplied)

In evaluating "the adequacy of the factual premises furnished by that source to support the validity of the source's conclusion," we find the strongest statement in the affidavit, to-wit:

". . . The aforesaid informant stated that he saw the said illegal drugs on said premises described on the 9th day of August, 1973, 3 hours prior to making this affidavit. . . ."

As strong as that statement is, it is still uncertain for failure to state *on which of the two premises* described, and in whose possession the informer saw those drugs. Did the informant see them at the truck stop, or at the residence, or at both places? That statement refers to "said premises described," which appears in the affidavit as "Neugent Truck Stop and/or Lewis Neugent Residence."

The affidavit goes on to read:

". . . The informant also stated that Lewis Neugent . . . *was seen* selling amphetamines at the truck stop but the amphetamines are brought from the residence. . . ." (Emphasis supplied)

Here, the affiant does not tell us that his informant personally saw the appellant selling amphetamines, only that the appellant "was seen" doing so. "Was seen" by whom and when? He states that appellant was seen selling amphetamines at the *truck stop*, but the warrant was issued to search the *residence*. He does not say that his informant saw amphetamines at the residence, or that he personally

saw them brought from the residence. How the informant determined this, is left to conjecture and speculation.

In *Haynes v. State*, 50 Ala.App. 96, 277 So.2d 372 (1973), in a similar situation, Judge Harris stated:

> ". . . Affiant does not set forth the underlying circumstances surrounding his observation of the 'stolen parts' entering the premises described by him. He does not say where he was when he claims to have seen what he said he saw . . ."

See also Justice Faulkner's affirming opinion of *Horzempa*, supra.

In *Miller v. State*, 54 Ala.App. 230, 307 So.2d 40 (1974), the affidavit stated that the informant had seen the defendant with the drugs in his possession. He also stated that he had obtained illicit amphetamines from the defendant. In reversing that case, this Court stated that the affidavit was insufficient to support a search warrant of the appellant's premises, stating:

> ". . . The warrant authorizes a search of the business premises of appellant and not a search of his person. "Nowhere in the affidavit does it appear that the informer had seen the drugs on the premises of the appellant. . . ."

Thus, using the reasoning in *Miller*, it is difficult to see how a magistrate, on being informed that drugs "were seen" being sold at the truck stop, would authorize a search warrant to be issued for the residence. The majority of this Court, being bound to apply the test sof *Aguilar* and *Spinelli*, therefore, find that the instant affidavit fails to state sufficient facts and underlying circumstances to exhibit probable cause to issue a search warrant for the residence of the appellant. The appellant's motion to suppress should have been granted, and the fruits of the search should not have been admitted in evidence over objection. For comparison of the instant affidavit with affidavits in similar cases held to meet the minimum legal requirements of validity, see: *Funches v. State*, 53 Ala.App. 330, 299 So.2d 771 (1974), cert, denied 293 Ala. 752, 299 So.2d 778, cert. denied—U.S.—, 95 S.Ct. 793 (1975) and *Funches v. State*, 55 Ala.App.—, 318 So.2d 762, cert. denied 294 Ala. —, 318 So.2d 768 (1975). Likewise, Cates, P.J., in *Tyler v. State*, 45 Ala.App. 155, 227 So.2d 442, cites us to *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, as to how to compose a narrative affidavit.

This Court realizes that it is a disheartening experience to a conscientious law enforcement officer seeing an otherwise valid case dissolve when his search warrant has been held to be invalid on appeal. A law enforcement officer, not trained as an attorney, armed with the results of his investigation or information furnished by his informant, goes before a magistrate who is a judicial officer and who is more familiar with the requisites for a valid affidavit. Where, as here, the affidavit fails to set forth sufficient underlying circumstances upon which a valid warrant may issue, the magistrate may, and in most cases should, question the officer for additional facts and take sworn testimony bearing on the "underlying circumstances." In this way, an otherwise defective affidavit may be bolstered by sworn testimony, thereby saving the warrant and the fruits of the search. *Oliver v. State*, 46 Ala.App. 118, 238 So.2d 916 (1970); *Funches* (1974), supra. Or, the magistrate may direct the officer to furnish a more comprehensive affidavit,

if such is possible, and save the State the expense and effort of a futile trial.

III

The appellant argues other issues: (1) the misdescription of the premises to be searched, and (2) allowing Officer Cooke's affidavit to go to the jury as an exhibit, where the affidavit states that Neugent was seen *selling* amphetamines, whereas he is only charged with *possession* in the indictment. While these issues raise serious doubts with this Court, we pretermit discussion and ruling thereon as this case must be reversed and remanded on the grounds hereinabove set forth.

REVERSED AND REMANDED.

Cates, P.J., and Tyson and Harris, JJ., concur.

DeCarlo, J., dissents.

DeCarlo, J., dissents.

In the present case, the affiant swore that his informer's "record of reliability for corrcetness had been good." This in my judgment goes beyond the conclusory statement that the unidentified informant was a "credible person."

Unlike *Aguilar*, the affirmation in question provides a means to judge the informant's reliability. The officer here swore to a basis for accepting the informant's story and that was his attestation to the informant's previous record of reliability for correctness. This statement presents just as good a foundation for belief as one detailing the number of times the informant has given correct information.

The Supreme Court of Alabama in *State, ex rel. Attorney*

General, 286 Ala. 117, 237 So. 2d 640, denounced the "batting average" requirement in this language:

> ". . . [N]o 'batting average' is required to establish the reliability of the informer. If the affiant so desires, he may cite prior instances of proven reliability, but it is not a requirement."

Perhaps more important is the fact that *Aguilar's* other test has been satisfied.

The affidavit does contain a sufficient statement of the underlying circumstances from which the informer concludes that Neugent was in possession of illegal narcotics.

We are told in the affidavit that:

. . .

> ". . . *The aforesaid informant stated that he saw the said illegal drugs on said premises described on the 9th day of August, 1973, 3 hours prior to making this affidavit.* The *informant* also *stated* that *Lewis Neugent*, who *resides at the above address*, was seen selling amphetamines at the truck stop *but the amphetamines are brought from the residence.* This information was given to me by said informant August 9th, 1973." (Emphasis ours).

It is alleged that the informer has personal knowledge that the drugs were on the said premises three hours before the affidavit in question was executed.

The report details the means by which the information was gathered and describes the criminal activity in a manner that enabled the magistrate to know it was not a casual rumor

or an offhand remark obtained at the truck-stop.

Although the affidavit does not specifically say the informer saw Lewis Neugent sell the amphetamines, it does say that the "amphetamines are brought from the residence," and that the informant stated Lewis Neugent resided at the above address.

What was alleged in the informer's tip certainly was cause to believe that a crime was being committed. It provides a substantial basis for the magistrate to conclude that narcotics were probably present on the premises and that was sufficient.

I do not believe this affidavit falls short of the standards set forth in *Aguilar*, and as explained in *U. S. v. Ventresca*, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684.

> ". . . [A]ffidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A proper gruding or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

Mr. Justice Goldberg went on to say:

> ". . . [W]here reason for crediting the source of the information is given, and when a magistrate has

found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner."

For these reasons, I respectfully dissent.

APPENDIX B

THE SUPREME COURT OF ALABAMA
SC 1679

In re: LEWIS E. NEUGENT

V.

STATE OF ALABAMA
Ex parte STATE OF ALABAMA ex rel.

ATTORNEY GENERAL
(Filed June 4, 1976)

BLOODSWORTH, JUSTICE.

We granted this petition for writ of certiorari, filed by the State, seeking our review and reversal of a decision of the Court of Criminal Appeals wherein that court reversed and remanded a judgment of conviction of one Neugent for illegal possession of amphetamines.

The reversal was based upon the conclusion of a majority of that court that the affidavit, supporting the search warrant, did not sufficiently aver "probable cause" in that it failed to meet the first 'prong' test of *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), i.e., requiring that the magistrate be informed of some of the "underlying circumstances" from which the informant concluded that the drugs were where he claims they were.

Thus, the question is: "Are there sufficient allegations in the affidavit as to the underlying circumstances from which the magistrate could conclude that the informant's information was 'reliable'?"

We answer in the affirmative and reverse and remand the judgment and decision of the Court of Criminal Appeals.

The affidavit in question was executed by Detective Sergeant John Cooke of the City of Tuscumbia Police Department before Judge Jerry M. Vanderhoef reads as follows:

"'STATE'S EXHIBIT A

"'STATE OF ALABAMA)(

"'COLBERT COUNTY)(

"'Personally appeared before me, Jerry M. Vanderhoef, Judge of the Colbert County Court of Colbert County, Alabama, John Coke, who after first being duly sworn by me, and who is personally known to me, deposes and says as follows:

"'*I have received information from a person whose record of reliability for correctness has been good;* that there is presently contained on the premises of Neugent Truck Stop and/or Lewis Neugent Residence, the residence being located some 150 to 200 yards West of said truck stop, the residence being reached by traveling West on a dirt road within approximately 50 feet of said truck stop. The truck stop to be searched is reached by traveling South on U. S. Highway 43 from its intersection with U. S. Highway 72 for approximately one to one and one-half miles; the truck stop being located on the West side of U. S. Hwy. 43. The truck stop being a truck stop and restaurant combination contained in one white block building, approximately 100 feet West of U. S. Hwy. 43, the residence of Lewis Neu-

gent being reached by traveling West on a gravel road located approximately 50 feet North of said truck stop for a distance of 150 to 200 yards. The residence being the only dwelling house located on said gravel road, the residence being a brick or masonry building in the police jurisdiction of Tuscumbia, Colbert County, Alabama, illegal drugs, to-wit: Marijuana, amphetamines and barbiturates. *The aforesaid informant stated that he saw the said illegal drugs on said premises described on the 9th day of August, 1973, 3 hours prior to making this affidavit. The informant also stated that Lewis Neugent, who resides at the above address, was seen selling amphetamines at the truck stop but the amphetamines are brought from the residence.* This information was given to me by said informant August 9th, 1973.

" 'Based on all the above information received from my reliable informant, I have probable cause to believe and do believe that there are contained in the residence of Lewis Neugent and Nugent Truck Stop, located at Highway 43 South Tuscumbia, Colbert County, Alabama, illegal drugs, to-wit: marijuana, amphetamines and barbiturates.

" 'I make this affidavit for the purpose of securing search warrants for the purpose of searching Lewis Neugent and the premises located at Neugent Truck Stop and Lewis Neugent residence West of Highway 43 South, Tuscumbia, Colbert County, Alabama.

" '/s/ John Cooke
Affiant

" 'Sworn to and subscribed before me, this the *9th* day of August, 1973.

" '/s/ Jerry M. Vanderhoef
Judge'

"(Emphasis supplied.)"

The affidavit describes the premises to be searched as "Neugent Truck Stop and/or Lewis Neugent Residence," although *the warrant was issued only to search the residence.* Both places were searched but *drugs were found and seized only at the residence.* This search and seizure formed the basis for the subsequent prosecution.

I.

First, we should note that the Court of Criminal Appeals held that the assertion in the affidavit ["I have received information from a person whose record of reliability for correctness has been good"] was sufficient to support the second 'prong' of *Aguilar*, the test as to "credibility" of the informant. In so doing, the Court seemed to invite our comment as to the viability of our "Possum" Davis case [*State ex rel Attorney General (In re: Horace E. Davis, alias v. State)*, 286 Ala. 117, 237 So. 2d 640 (1970) (per Merrill, J.)], because the court wrote that subsequent holdings by federal courts and by our Court "would indicate that the language approved of in *State ex rel. Attorney General* may no longer be held to be valid." The affidavit in the instant case is identical in wording to that in *Davis*, "I have received information from a person whose record of reliability for correctness has been good; . . . ." We respond by taking this opportunity to reaffirm *Davis*, holding this aver-

ment to be sufficient for the reasons stated in *Davis*. We know of no United States Supreme Court decision to the contrary.

II.

The Court of Criminal Appeals concludes that the second prong of *Aguilar* is not satisfied. This is the basis for the reversal and presents us with the question: "Are the allegations in the affidavit sufficient to satisfy the reliability of the informant's information?"

The affiant states that an otherwise reliable informer says he *saw* the drugs on the premises three hours before making the affidavit. Affiant then adds the informer stated that Neugent, who resides at the residence, was *seen selling* drugs at the truck stop but they were brought from the residence.

We think these statements are sufficient to satisfy the *Aguilar* test as to the "reliability" of the informant's information. Admittedly, if the affiant had stated the informer saw the selling take place, and when, the case would have been much stronger. Nonetheless, we think the timely observation of the drugs at the house coupled with the statement that Neugent was seen selling drugs at the truck stop, which were brought from the residence, is sufficient.

The Court of Criminal Appeals finds further fault with the affidavit because it describes the premises as "Neugent Truck Stop and/or Lewis Neugent Residence." Although use of "and/or" has been held to be "slovenly pleading," "equivocal, uncertain, and indefinite," by some courts, and as "textually dangerous" and "indefinite and uncertain," by our courts in civil cases, their use has been held not to be

demurrable. (See special concurrence in *Air Engineers, Inc. v. Reese*, 283 Ala. 355, 363, 217 So. 2d 66, 77 (1968).) We do not consider their use here to be fatal to the state, particularly in view of the fact that the warrant was only for the residence and the seizure was of drugs in the residence. Moreover, our Court has held "and/or" to allege in the disjunctive. *Hays v. McCarty*, 239 Ala. 400, 195 So. 241 (1940). And, as to one of the disjunctives (i.e., the residence), the averments are in compliance with *Aguilar*.

The best general accepted definition of "probable cause" is that it exists where

> ". . . the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] . . . sufficient in themselves to warrant a man of reasonable caution in the belief that [an offense has been or is being committed]."

Carroll v. United States, 267, U. S. 132, 162, 45 S. Ct. 280, 288, 69 L. Ed. 543, 555 (1925).

We think "probable cause" was satisfied here. To reach any other conclusion, in our judgment, would subject the affidavit in this case to the sort of hypertechnical construction condemned by the United States Supreme Court in *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965), quoted with approval in *United States v. Harris*, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971).

REVERSED AND REMANDED.

Maddox, Faulkner, Jones, Shores, and Embry, JJ., concur.

Almon, J., concurs in the result.

Heflin, C. J., not sitting.

APPENDIX C

THE COURT OF CRIMINAL APPEALS OF ALABAMA

8 DIV. 655

LEWIS E. NEUGENT

V.

STATE OF ALABAMA

(Filed August 24, 1976)

It is ordered that the judgment of the Circuit Court be affirmed on mandate of the Alabama Supreme Court.

No Opinion.

All the judges concur except Cates, P. J., not sitting.

APPENDIX D

THE COURT OF CRIMINAL APPEALS OF ALABAMA

8 DIV. 655

LEWIS E. NEUGENT

V.

STATE OF ALABAMA

(Filed October 26, 1976)

AFTER REMANDMENT

BOOKOUT, JUDGE

This Court originally reversed the appellant's conviction (Ms. December 16, 1975). We were reversed by the Alabama Supreme Court (Ms. June 4, 1976) — Ala. —, — So. 2d —. Following remandment by that Court, we summarily affirmed, on mandate of the Supreme Court, on August 24, 1976. On rehearing the appellant raises certain points which were raised but not considered by this Court on the original appeal. Since we have concluded that the affidavit was insufficient to support the search warrant, we had pretermitted consideration of other alleged errors. We must now address ourselves to the following issues:

1. Was the misdescription of the premises to be searched of such a magnitude as to make the search warrant invalid?

2. Was it reversible error to allow the officer's affidavit to go to the jury where appellant is charged with *possession*

of amphetamines and the affidavit states that appellant was seen *selling* amphetamines?

3. On cross-examination, may the prosecutor ask appellant's character witnesses if they *knew* that appellant had committed specific offenses?

I

Although there appears to be some misdescription of the premises to be searched, we do not find this to make the warrant fatal under the circumstances in the instant case.

We have held that the description in a search warrant is sufficient if officers can, with reasonable effort, ascertain and identify the place to be searched. If a prudent officer is able to locate the property definitely and with reasonable certainty from the face of the warrant, the description is sufficient. "The description must be such that any person familiar with the locality can, by inquiring, identify the premises described." *Tyler v. State*, 45 Ala.App. 155, 227 So. 2d 442 (1969).

Here, the premises were described in the affidavit attached to the warrant as, "Neugent Truck Stop and/or Lewis Neugent Residence." The search warrant described the residence to be searched as being located, "West of said Neugent Truck Stop on Highway 43, Tuscumbia, Alabama. . . ." The geographical location was set out in the affidavit with sufficient certainty to lead officers there:

> ". . . The truck stop to be searched is reached by traveling South on U. S. Highway 43 from its intersection with U. S. Highway 72 for approximately one

> to one and one-half miles; the truck stop being located on the West side of U. S. Hwy. 43. . . ."

Although the description was not fully accurate as to the type of construction of the buildings in question, the misdescription was not sufficient to mislead the law enforcement officers. The officers, by following the directions set out in the affidavit and warrant found the premises by preceeding on the highway set out therein the appropriate distance stated. There, they saw a large sign which read, "Neugent's Truck Stop." Therefore, pursuant to *Tyler*, supra, we believe the description was sufficient.

II

The trial judge did not conduct a pretrial hearing on the appellant's motion to suppress the fruits of the search. After the jury was impaneled and the trial commenced, the trial judge held a hearing on the motion to suppress, outside the presence of the jury. At that time, witnesses testified as to probable cause for issuance of the search warrant. The affidavit and search warrant were admitted into evidence in the probable cause hearing over appellant's objection that (1) the documents were not properly authenticated; (2) a photostatic copy was not the best evidence; (3) the official capacity of the magistrate was not shown; and (4) the return on the warrant was not dated.

The trial court overruled the appellant's motion to suppress, the jury was returned to the courtroom, and the trial resumed. During the course of the testimony of Officer Cooke, the State again offered the search warrant and supporting affidavit into evidence. Appellant renewed his previous objection thereto. The appellant did not object to the introduction of those documents on the ground of hearsay.

However, during closing argument when the District Attorney apparently read from the affidavit, the appellant objected for the first time on the ground that such evidence was hearsay. The following transpired:

> "MR. HUNT: We object to his reading that on the grounds that it is not evidence, it is hearsay.
>
> "MR. PATTON: It is probable cause to secure a search warrant.
>
> "BY THE COURT: Wasn't that introduced in evidence?
>
> "MR. PATTON: Yes, sir.
>
> "BY THE COURT: If it is evidence, it can be argued.
>
> "MR. HUNT: We renew our objection on the grounds that the defendant has not had an opportunity to question this informant and to cross examine him on the statement he made.
>
> "BY THE COURT: Overruled."

A.

It would have been preferable to have had a pretrial hearing on all the appellant's motions so that hearsay evidence to support probable cause could not get intermingled with primary evidence in the trial. Hearsay evidence may be used in a probable cause hearing to support the issuance of a warrant. *Jones v. United States*, 362 U.S.257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). However, it may not be used as

primary evidence to establish guilt during the trial. *Tanner v. State*, 259 Ala. 306, 66 So.2d 836 (1953); *Pierce v. State* (Okl.Cr. 1955) 278 P.2d 852. In *People v. Silverman*, 274 N.Y.S.2d 190 (1966), the Supreme Court of New York, Appellate Division, stated the proper rule:

> "The introduction into evidence of a search warrant is for the sole purpose of demonstrating that the search was lawful, as distinguished from unlawful. It has no probative value in establishing the guilt of the accused. . . ."

In *Brinegar v. United States*, 338 U.S. 160, 172, 69 S.Ct. 1302, 1309, 93 L.Ed. 1879 (1949), the United States Supreme Court found that there is a great difference between what is required to prove guilt in a criminal case and what is required to show probable cause for a search. In that case, Mr. Justice Jackson stated, in pertinent part:

> ". . . There is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them.
>
> "For a variety of reasons relating not only to probative value and trustworthiness, but also to possible prejudicial effect upon a trial jury and the absence of opportunity for cross-examination, the generally accepted rules of evidence throw many exclusionary protections about one who is charged with and standing trial for crime. Much evidence of real and substantial probative value goes out on considerations irrelevant to its probative weight but

relevant to possible misunderstanding or misuse by the jury.

* * * *

"The court's rulings, one admitting, the other excluding the identical testimony, were neither inconsistent nor improper. They illustrate the difference in standards and latitude allowed in passing upon the distinct issues or probable cause and guilt. Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. . . .

* * * *

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."

While the better or more efficient procedure may be to hold a pretrial hearing on motions to suppress, we find no prejudicial effect upon the appellant so long as the matter is heard outside the presence of the jury. *Childers v. State*, (Ms. August 24, 1976) — Ala.App. —, — So.2d —. And, further providing that the appellant is not prejudiced by having evidence from the suppression hearing improperly introduced against him during the trial on the merits of

the case. However, evidence from a probable cause hearing, which may be inadmissible as primary evidence of guilt, may nevertheless end up before the jury where proper and timely objection is not made by the appellant.

The State contends that the appellant's objection during oral argument was not sufficiently clear to apprise us of what the prosecutor was doing that was objectionable. It is true that the objecting party must state into the record enough of the remarks of the prosecutor to inform the court as to what was really said and what was objectionable. *McClary v. State*, 291 Ala. 481, 282 So.2d 384 (1973).

The objection in question here was:

"We object to his reading *that* on the grounds that it is not evidence, it is hearsay." (Emphasis supplied.)

Further:

"We renew our objection on the grounds that the defendant has not had an opportunity to question this informant and to cross examine him on the statement he made."

When the affidavit and warrant were admitted into evidence during the trial, the appellant renewed the objection he raised during the suppression hearing. He did not object on the ground that it was hearsay. The trial judge was not in error in overruling the objection on the grounds specified, although the documents were clearly hearsay and subject to exclusion *upon proper objection*. Where the appellant made objection on specific grounds when the documents were introduced, all grounds not specified were waived.

Roynica v. State, 54 Ala.App. 436, 309 So.2d 475, cert. denied 293 Ala. 772, 309 So.2d 485 (1974); *Rogers v. State*, 53 Ala.App. 573, 302 So.2d 547 (1974). Proper objection must have been made at the time the evidence was offered. An objection during closing arguments to reading from an exhibit already in evidence comes too late. *Walker v. State*, 265 Ala. 233, 90 So.2d 221 (1956).

III

One of appellant's character witnesses was asked by the prosecutor:

> "Q. I will ask you, Mr. Louis, if you knew the defendant, Louis Neugent, was charged with transporting in 1970?"

The court overruled the appellant's objection, and the following occurred:

> "MR. PATTON CONTINUES: Did you know that this defendant plead (sic) guilty to violation of the Prohibition Law on March 3, 1967, in Colbert County Court in Colbert County, Alabama?
>
> "A. I didn't.
>
> "Q. Would either one of these facts change your opinion as to reputation, if they are facts, as to the reputation of this defendant?
>
> "A. I don't believe it would."

The rule applying to this situation is clearly stated in *Johnson v. State*, 260 Ala. 276, 69 So.2d 854 (1954):

> "... Where a witness testified as to the general reputation or character of the defendant, the knowledge of the witness as to such reputation or character may be tested on cross examination by asking him if he has not *heard* of specific acts of bad conduct on the part of the accused. But the witness may not be interrogated as to the *fact* of such particular acts...."

(Empsasis supplied.) (Citations omitted.)

Even though the questions here propounded were improper and the appellant's objections should have been sustained, the trial judge's ruling resulted in no prejudicial error since the answer of the witness was favorable to the appelant. The witness stated that he did not know the appellant had pled guilty to the charge in question, and further that if it was a fact, it would not change his opinion as to appellant's reputation.

Again we quote from *Johnson*, supra:

> "... Furthermore, no prejudicial error resulted to the defendant from the line of questions asked his character witnesses. Each of the witnesses testified that he had not heard of any such conduct on the part of the defendant. The overruling on an objection to a question not answered by the witness or favorably answered to the objector, is not prejudicial error. Stephens v. State, 250 Ala. 123, 33 So.2d 245. But it is insisted that even though the questions were answered favorably to the objector, the very asking of the questions resulted in prejudice in the minds of the jurors toward the defendant. We

cannot assent to this position. A matter of this kind is largely in the discretion of the trial court. Snead v. State, 243 Ala. 23, 8 So.2d 269. . . ."

We distinguish this decision from our holding in *Sexton v. State*, 54 Ala.App. 66, 312 So.2d 71 (1975), where the improper question elicited a reply which was prejudicial to that appellant. In the instant case, *Johnson*, supra, applies, and no error results from the witness' answer which was favorable to the appellant.

APPLICATION FOR REHEARING OVERRULED. AFFIRMED.

All the Judges concur except Cates, P.J., not sitting.

APPENDIX E

THE SUPREME COURT OF ALABAMA

SC 1679

In re: LEWIS E. NEUGENT

V.

STATE OF ALABAMA

Ex parte Lewis E. Neugent

(Filed December 3, 1976)

SHORES, JUSTICE

Petition of Lewis E. Neugent for certiorari to the Court of Criminal Appeals.

Writ Denied.

No Opinion.

Heflin, C. J., and Maddox, Faulkner and Beatty, J. J., concur.

APPENDIX F

STATE OF ALABAMA)(

COLBERT COUNTY)(

Personally appeared before me, Jerry M. Vanderhoef, Judge of the Colbert County Court of Colbert County, Alabama, John Cooke, who after first being duly sworn by me, and who is personally known to me, deposes and says as follows:

I have received information from a person whose record of reliability for correctness has been good; that there is presently contained on the premises of Neugent Truck Stop and/or Lewis Neugent Residence, the residence being located some 150 to 200 yards West of said truck stop, the residence being reached by traveling West on a dirt road within approximately 50 feet feet of said truck stop. The truck stop to be searched is reached by traveling South on U. S. Highway 43 from its intersection with U. S. Highway 72 for approximately one to one and one-half miles; the truck stop being located on the West side of U. S. Hwy. 43. The truck stop being a truck stop and restaurant combination contained in one white block building, approximately 100 feet West of U. S. Hwy. 43, the residence of Lewis Neugent being reached by traveling West on a gravel road located approximately 50 feet North of said truck stop for a distance of 150 to 200 yards. The residence being the only dwelling house located on said gravel road, the residence being a brick or masonry building in the police jurisdiction of Tuscumbia, Colbert County, Alabama, illegal drugs, to-wit: Marijuana, amphetamines and barbituates. The aforesaid informant stated that he saw the said illegal drugs on said premises

described on the 9th day of August, 1973, 3 hours prior to making this affidavit. The informant also stated that Lewis Neugent, who resides at the above address, was seen selling amphetamines at the truck stop but the amphetamines are brought from the residence. This information was given to me by said informant August 9th, 1973.

Based on all the above information received from my reliable informant, I have probable cause to believe and do believe that there are contained in the residence of Lewis Neugent and Neugent Truck Stop, located on Highway 43 South Tuscumbia, Colbert County, Alabama, illegal drugs, to-wit: marijuana, amphetamines and barbituates.

I make this affidavit for the purpose of securing search warrants for the purpose of searching Lewis Neugent and the premises located at Neugent Truck Stop and Lewis Neugent residence West of Highway 43, South, Tuscumbia, Colbert County, Alabama.

/s/ John Cooke
Affiant

Sworn to and subscribed before me, this the 9th day of August, 1973.

/s/ Jerry M. Vanderhoef
Judge

TO ANY SHERIFF, CONSTABLE OR LAWFUL OFFICER OF THE STATE OF ALABAMA

John Cooke a *Police Officer* of *Tuscumbia, Alabama*, Colbert County, Alabama, having appeared before me and made the attached affidavit, deposes and says that he has probable

cause for believing and does believe that *Lewis Neugent*, has in *his* possession at this time, in the premises located at *his residence located West of said Neugent Truck Stop on Highway 43, Tuscumbia, Alabama*, Colbert County, Alabama, illegal drugs, to-wit: marijuana, amphetamines and barbiturates, and it appearing that said probable cause is based upon information furnished by a person whose record of reliability for correctness has been good, you are ordered forthwith to make an immediate search of the premises of the said *Lewis Neugent, located at his residence* located *West of Neugent Truck Stop on Highway 43, Tuscumbia, Alabama*, Colbert County, Alabama for the said illegal drugs, to-wit: marijuana, amphetamines and barbiturates, and if you find any part thereof, bring the same to me at my office in Tuscumbia, Alabama.

Done this 9th day of August, 1973.

/s/ Jerry M. Vanderhoef
Judge